No. 76-1638

In the Supreme Court of the United States

OCTOBER TERM, 1977

SAMIH K. MASRI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 547 F. 2d 932.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1977. A petition for rehearing was denied on March 24, 1977. Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to May 23, 1977, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in refusing to admit polygraph evidence offered by petitioner.

2. Whether it was proper for the judge who presided at petitioner's jury-waived trial to rule on petitioner's motion for a new trial alleging that false testimony in the government's case had tainted the verdict.

3. Whether the post-trial payment of a reward to an informant who testified against petitioner, where the informant had no pretrial expectation of receiving a reward, violated due process of law and warranted reversal of petitioner's conviction.

STATEMENT

After a jury-waived trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiracy to import heroin into the United States, in violation of 21 U.S.C. 952(a) and 963. He was sentenced to 12 years' imprisonment and three years' special parole. The court of appeals affirmed (Pet. App. 1-13).

The evidence showed that petitioner was the central figure in a conspiracy to smuggle a large quantity of heroin from Lebanon into this country. Undercover Agent Jack Short of the Drug Enforcement Administration infiltrated the conspiracy in its earliest stages. From September 1973 until April 1975, petitioner met with Agent Short approximately 14 times to negotiate a long-term supply contract whereby petitioner would arrange a monthly delivery of between 10 and 20 kilos of 97.5% pure heroin from his associates in Lebanon to Agent Short in exchange for a substantial commission (Tr. 77-78, 124-134, 266-318, 434-447, 457-461, 474-480, 486-491, 502-507).[1] At first it

[1]"Tr." designates the transcript of petitioner's trial. "H." designates the transcript of the hearing on petitioner's motion for a new trial.

was agreed that Short would take delivery of the drug in the Bahamas (Tr. 291-292), but the proposed delivery site was later changed to Atlanta, Georgia (Tr. 77, 474-475). Petitioner told the agent that he planned to transport the heroin dissolved into several gallons of water and that, once it arrived at its destination, the drug would be precipitated out of solution for futher processing (Tr. 310, 439-441; 645-662). Twice during this period, petitioner traveled to Lebanon to consult with his suppliers there (Tr. 18-19, 33-34, 134; G. Exhs. 1, 4, 37).

From the outset of his dealings with Short, petitioner harbored suspicions that Short might be a government agent and repeatedly sought assurances from Short that he could be trusted. Several months after their first discussions, the two agreed that Wally Ghalayini, a mutual acquaintance with whom both had conducted drug-related business in the past, could establish a confidence between them that would permit their proposed transactions to go forward (Tr. 307-311). Ghalayini subsequently agreed to aid the importation scheme (Tr. 318, 451; G. Exhs. 17, 18).[2]

In March 1974, as the negotiations with Agent Short neared fruition, petitioner and Ghalayini contacted one of petitioner's co-workers, Bud Miller, who had introduced Agent Short to petitioner. They asked Miller for proof that Short was not a government agent. Unbeknownst to them, Miller was a government informer. Miller reassured the two men that Short was trustworthy, and during the following months Miller acted as a go-between for Short and petitioner, relaying information concerning arrangements for the first delivery (Tr. 49-57, 89-92, 100-138, 268).

[2]Ghalayini was tried jointly with petitioner and was convicted of the same offenses.

Before any deliveries were made, however, petitioner and Ghalayini were arrested.

Petitioner did not dispute Agent Short's account of their numerous meetings. Rather, he testified that his attempt to negotiate a sale of heroin to Short was part of a scheme devised by Miller to defraud Short of the purchase price. According to petitioner, he and Miller planned to turn Short over to the authorities after they had received advance payment for the heroin. Petitioner claimed that he had never intended to import any heroin, despite his contrary representations to Short, and he denied that he knew anyone in Lebanon who could have supplied him with the drug (Tr. 732-781).

ARGUMENT

1. Petitioner sought to introduce into evidence the results of a polygraph examination that he had undergone at the behest of defense counsel prior to trial and that, he alleged, would support his claim that his negotiations with Agent Short were a sham. In accordance with the Fifth Circuit's rule that such evidence is inadmissible (see *United States* v. *Cochran*, 499 F. 2d 380, 393, certiorari denied, 419 U.S. 1124), the trial court rejected petitioner's offer (Tr. 715-716). Petitioner contends (Pet. 14) that the trial court's ruling was error and that there is a conflict among the circuits concerning the admissibility of polygraph evidence that this Court should resolve.

The courts of appeals are in general agreement that the district courts need not receive into evidence the results of "lie-detector" tests. That position reflects the consensus that "the polygraph does not command scientific acceptability and * * * is not * * * sufficiently reliable in ascertaining truth and deception to justify its utilization in the trial process." *United States* v. *Alexander*, 526

F. 2d 161, 164 (C.A. 8). Indeed, the majority of the circuits that have addressed the issue agree with the Fifth Circuit that such evidence should not be admitted. *United States* v. *Skeens*, 494 F. 2d 1050, 1053 (C.A.D.C.); *United States* v. *Bando*, 244 F. 2d 833, 841 (C.A. 2) (dictum), certiorari denied, 355 U.S. 844; *United States* v. *Alexander, supra*, 526 F. 2d at 166[3]; *United States* v. *Russo*, 527 F. 2d 1051, 1058-1059 (C.A. 10), certiorari denied, 426 U.S. 906. Although the Sixth, Seventh and Ninth Circuits have declined to adopt a *per se* rule of exclusion, those courts hold that a trial court's decision to reject polygraph evidence is never an abuse of discretion. *E.g., United States* v. *Mayes*, 512 F. 2d 637, 648 n. 6 (C.A. 6), certiorari denied, 422 U.S. 1008; *United States* v. *Tremont*, 351 F. 2d 144, 146 (C.A. 6); *United States* v. *Sweet*, 548 F. 2d 198, 203 (C.A. 7), certiorari denied, April 18, 1977, No. 76-1286; *United States* v. *Infelice*, 506 F. 2d 1358, 1365 (C.A. 7), certiorari denied, 419 U.S. 1107; *United States* v. *Marshall*, 526 F. 2d 1349, 1360 (C.A. 9), certiorari denied, 426 U.S. 923; *United States* v. *Demma*, 523 F. 2d 981, 987 (C.A. 9) (*en banc*). Thus, in no circuit would the trial court's rejection of petitioner's polygraph evidence have constituted error.[4]

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[3]*United States* v. *Oliver*, 525 F. 2d 731 (C.A. 8), certiorari denied, 424 U.S. 973, cited by petitioner (Pet. 15) as falling among those decisions giving the district court discretion over the admission of polygraph evidence, was distinguished by the Eighth Circuit in *Alexander, supra*, 526 F. 2d at 170 n. 18, as involving a situation in which the government had assented to the introduction of such evidence.

[4]Petitioner substantially overstates (Pet. 6, 17) the district court's willingness to admit polygraph evidence in this case. The court refused absolutely to admit the evidence proffered by petitioner—*i.e.*, the results of a polygraph test administered by someone of petitioners's own choosing (Tr. 705). The court then said that it might

The long-standing difference in approach taken, on the one hand, by those courts of appeals that flatly prohibit the admission of polygraph evidence and, on the other, by those courts that vest the district courts with unfettered discretion to exclude such evidence does not amount to a conflict over fundamental principles warranting resolution by this Court.

2. During cross-examination by defense counsel, informant Miller denied that he had applied to the Internal Revenue Service for a reward for his cooperation with the government in a related tax prosecution (Tr. 219). After petitioner's conviction, it was discovered that Miller had in fact applied for such a reward. Petitioner moved for a new trial on the basis of Miller's false testimony.

After a plenary hearing on the motion, the trial judge who presided at petitioner's bench trial found that the prosecutor should have known that Miller's testimony was false because information concerning Miller's reward application was in the government's possession at the time of trial, and that the failure to disclose this information to petitioner violated the rule of *Brady* v. *Maryland*, 373 U.S. 83.[5] The trial judge determined, however, that even if the information had been disclosed at trial it would not have affected his assessment of Miller's credibility (H. 150-164).

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consider—but stressed that "I do not say I will do this" (*ibid.*)—admitting evidence of a polygraph test administered by someone acceptable to both petitioner and the government (Tr. 705-706).

[5]The court found that the violation was inadvertent, resulting from "oversight and negligence * * * in not searching thoroughly throughout the history of Miller and any other witness that they were going to present, to find out whether or not they had ever been paid or received any rewards and, if so, to discover that evidence and to give it to the defense" (H. 161).

Petitioner's contention (Pet. 18-22) that it was improper for the judge who found him guilty at trial to pass on the validity of his *Brady* claim is unpersuasive. When it is discovered, after a conviction, that the government's case at trial included false testimony of which the prosecutor knew or should have known, the defendant is entitled to a new trial "if there is any reasonable likelihood that the false testimony could have affected the judgment of the [factfinder]." *United States* v. *Agurs*, 427 U.S. 97, 103. See also *Giglio* v. *United States*, 405 U.S. 150, 154. Where the defendant has been tried before a jury, that determination is necessarily somewhat speculative because the jury is no longer available for consultation. Here, by contrast, no speculation was required: the factfinder at petitioner's trial, the district judge, was available to assess the impact of Miller's false testimony on the verdict and concluded that there was none. Petitioner's *Brady* claim was submitted to the one person who was in the best position to rule on its merit, and petitioner was entitled to no more.

3. Petitioner urges (Pet. 23-27) that the post-trial payment of a $15,000 reward to informant Miller constituted government misconduct requiring reversal of his conviction under the Due Process Clause of the Fifth Amendment. However, after receiving extensive testimony at the hearing on petitioner's motion for a new trial concerning the payment to Miller, the district court found that Miller had not been promised a reward prior to trial and that after trial Agent Short applied for the reward on behalf of Miller without Miller's knowledge (H. 151-152, 155). Thus, as the court of appeals observed (Pet. App. 12), Miller was not subject to any "improper, financial inducement * * * [and] had no reason unknown to the trial judge to perjure or embellish his testimony." Petitioner's unsupported allegations to the contrary were thoroughly

considered and rejected by both courts below, and there is accordingly no reason for this Court to address them. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635. Since the payment to Miller was not part of an impermissible contingent fee arrangement, it did not offend due process of law. See *Williamson* v. *United States*, 311 F. 2d 441 (C.A. 5); *United States* v. *Jett*, 491 F. 2d 1078, 1081 (C.A. 1).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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